U.S. Department of Justice
Federal Bureau of Investigation

September 2012

FBI Law Enforcement Bulletin

False Allegations of Adult Crimes

September 2012
Volume 81
Number 9

**United States
Department of Justice
Federal Bureau of Investigation
Washington, DC 20535-0001**

**Robert S. Mueller III
Director**

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The attorney general has determined that the publication of this periodical is necessary in the transaction of the public business required by law. Use of funds for printing this periodical has been approved by the director of the Office of Management and Budget.

The *FBI Law Enforcement Bulletin* (ISSN-0014-5688) is published monthly by the Federal Bureau of Investigation, 935 Pennsylvania Avenue, N.W., Washington, D.C. 20535-0001. Periodicals postage paid at Washington, D.C., and additional mailing offices. Postmaster: Send address changes to Editor, *FBI Law Enforcement Bulletin*, FBI Academy, Quantico, VA 22135.

The Training Division's Outreach and Communications Unit produces this publication with assistance from the division's National Academy Unit. Issues are available online at *http://www.fbi.gov*.

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Cover Photo
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Send article submissions to Editor, *FBI Law Enforcement Bulletin*, FBI Academy, Quantico, VA 22135.

FBI Law Enforcement Bulletin

Features

Departments

ISSN 0014-5688 USPS 383-310

False Allegations of Adult Crimes

By JAMES MCNAMARA, M.S., and JENNIFER LAWRENCE, M.A.

At 7:30 a.m., an unknown male abducted Pamela at knifepoint while she fueled her car at a convenience store. The offender then forced her to drive to a bridge, where they crossed into a neighboring state. During the long ride, he choked her with a bicycle security chain and slashed her with a knife.

Next, the assailant ordered Pamela to park the vehicle in a secluded rural area and led her into the woods. He bound her to a tree, placing the bicycle chain around her neck. The subject then assaulted her vaginally with a box cutter and lacerated her breasts and right nipple.

Then, he ordered Pamela back into her car and had her drive them to a nearby ferry. The subject exited the vehicle and disappeared while heading toward the ferry at about 3 p.m. Pamela drove herself to the nearest hospital for treatment, and staff members notified the police. After receiving medical attention, she was released.

State and local police investigators conducted the initial interview of Pamela at the hospital. Although initially cooperative, she stopped answering questions. Pamela agreed to meet investigators at a later date at the state police barracks

to discuss the abduction and sexual assault, but she never arrived.

A review of hospital medical records showed that Pamela received treatment for superficial lacerations to her right hand, left breast, right breast and nipple, and neck. She also had several superficial abrasions in her pubic region. The doctor described her as tired but in no acute discomfort.

Officers found no forensic evidence from Pamela or her vehicle. They contacted the FBI's National Center for the Analysis of Violent Crime (NCAVC) for assistance in developing an interview strategy. Investigators determined that Pamela suffered from depression and anxiety and had a prescription for an antidepressant. Working with NCAVC, officers developed a successful interview strategy, and Pamela finally admitted that she fabricated the abduction and sexual assault.

Her false allegation tied up the resources of several state and local police departments, as well as the area FBI office. Significant media attention focused on the case prior to her confession. An artist's sketch of the imaginary offender circulated. The media quoted a spokesperson for a local women's rape crisis center as saying, "What I see is a community that is scared…."

Background

A false allegation crime involves persons reporting a fabricated offense that has occurred against them to a law enforcement agency. Both men and women commit these crimes; however, women perpetrate the majority of them. A limited number of studies have focused on false allegation adult crimes, with the majority of research addressing cases of rape and to a lesser degree stalking.[1]

These offenses occur throughout America every year. Unfortunately, they waste substantial investigative resources—needed for legitimate cases involving real victims—before authorities can identify them as false allegations. And, as noted in the quote from the crisis center worker, these false allegations can severely affect communities and the people who live and work there. Worse, they can make it harder for law enforcement agencies and citizens to take real victims of crime seriously.

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Offender Motivations

Perpetrators of false allegation crimes have various underlying motivations that fall into one or more categories. Investigators may encounter cases involving more than one motivation.[2]

- Mental illness/depression
- Attention/sympathy
- Financial/profit
- Alibi
- Revenge

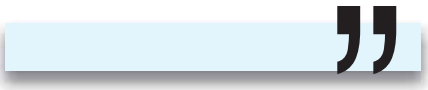
A significant life problem (e.g., marital, financial, employment) that the offender does not have the skills to resolve drives the motivation. Many perpetrators have multiple life difficulties. Rather than seeking appropriate assistance from family members, coworkers, clergy members, or mental health professionals, offenders develop a self-victimization plan. These individuals may realize temporary relief from their life problems due to immediate attention and support from family, neighbors, and coworkers. And, more often than not, false allegation offenders do not consider the serious, long-term law enforcement investigation or significant media coverage that reveals the truth. In the long run, offenders are worse off than before the false allegation crime report and even may face prosecution.

Typically, female offenders want to gain attention and sympathy and will falsely allege offenses, such as interpersonal violence (e.g., sexual assault), more likely to achieve that result. While the desire for attention and sympathy also can motivate males, they tend to opt for nonsexual offenses, such as physical assault or attempted murder.[3] Offenders who falsely allege more impersonal crimes, like theft or vandalism, more likely will have financial or profit motives. And, in cases where the perpetrator has no motive or incentive, mental health issues may prove significant.

Investigations

Law enforcement officers may find false allegation crimes complex and difficult to unravel. Further, investigators working closely with offenders may become so emotionally invested in the case that they have a hard time believing that the individual could be deceptive.

A suspected false allegation requires a two-pronged approach—covert and overt.



A suspected false allegation requires a two-pronged approach—covert and overt. Of course, overt investigation proves necessary in the early phase of the case before officers identify the complaint as a false allegation. If the claim is legitimate, investigators need to identify and apprehend the offender. They should use all normal resources and carefully protect the reporting victim's reputation.

The covert investigation focuses on establishing whether the case involves a false allegation crime. Keeping this prong covert helps to avoid prematurely accusing a legitimate victim of a false allegation, prevent derailing the overt investigation, and preserve valuable information for the subject interview. Officers must gather all possible details concerning offenders. Because false allegation perpetrators have serious life problems motivating them, the covert investigation quietly must identify which issues trouble the individual. This type of information proves crucial during the interview process. Investigators need to examine offenders' personal relationships, employment situation, finances, past criminal history, and other areas of their life to identify any indication of abnormal stress.

Additionally, the covert investigation determines if the offender has made other false allegations or crime reports. Officers also should check with local emergency rescue departments or hospital emergency rooms to discover any false injury or illness reports made by the individual. As the covert investigation progresses, the lead investigator responsible for the overall coordination of the case should receive all information.

The experience of NCAVC and research related to this phenomenon have shown that false

The FBI's National Center for the Analysis of Violent Crime (NCAVC)

NCAVC consists of four units, including three Behavioral Analysis Units (BAUs) and the Violent Criminal Apprehension Program (ViCAP) Unit. BAU-1 handles cases involving threat assessments or counterterrorism; BAU-2 addresses investigations of adult crimes, including serial or individual murder and serial sexual assaults; and BAU-3 deals with crimes involving child victims.

The three BAUs offer a broad array of operational services for investigators or prosecutors.

- Crime analysis
- Behavioral characteristics of unknown offenders
- Personality assessments
- Interview strategy
- Search warrant affidavit assistance
- Investigative strategy
- Prosecutive/trial strategy
- Expert testimony
- Media strategy

In collaboration with other law enforcement agencies and academic institutions, the BAUs also conduct research into various crime areas. Additionally, the BAUs share the knowledge gained through operational experience and research with law enforcement agencies through a variety of training venues.

allegation adult crimes usually involve only one offender. In most cases, the individual conducts preplanning, preparation, or staging of the crime scene.[4] Fewer incidents of false allegation adult crime arise from spur-of-the-moment decisions. Many cases have involved more than one offense reported simultaneously to law enforcement (e.g., carjacking/extortion, abduction/rape). Investigators need to carefully scrutinize forensic evidence and injuries for inconsistencies.

For example, while working the night shift, Charles, an experienced patrol officer for a medium-sized city police department, stopped a vehicle in a deserted area outside of town. Shortly thereafter, he reported that the driver produced a .22 caliber handgun and shot him in the torso at close range. Responding officers could not locate a vehicle or suspect in the area. Further, the bullet hit Charles in an ideal place on his ballistic vest and was deflected, causing him no injury.

Investigators quickly determined that he could not describe his shooter or the vehicle he pulled over. As the investigation progressed, Charles would not give a detailed statement about the incident and declined a polygraph test. The covert investigation in the case uncovered that he faced extreme personal stress due to a problematic marriage and several extramarital affairs.

Investigators eventually gained a confession from Charles and determined that he got the idea from an incident in a neighboring county the night before wherein a deputy sheriff was shot and killed during a traffic stop. Charles staged his own

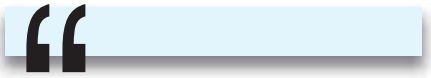
shooting to gain attention and sympathy.

Interview Strategies

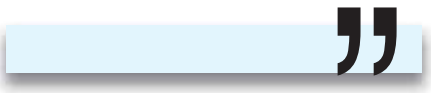
When allegations prove false, often no forensic evidence exists. Most testimony by eyewitnesses tends to offer exclusively postoffense details and include only information provided by the offender. As a result, the ability of investigators to gain an admission or confession from the perpetrator can become crucial in resolving the case.

Officers face the challenge of determining which life problems have caused the offender to present a false report to law enforcement. Generally, the most effective interviews involve an empathetic approach toward the subject. Directly challenging offenders with inconsistencies in their account or the lack of hard evidence likely will make them shut down or stubbornly insist on the accuracy of their story. After establishing rapport, interviewers need to address the person's life problems. However, empathetic does not mean sympathetic. Authorities can express an understanding of difficulties that caused the situation without condoning the behavior. By addressing the offender's underlying issues, interviewers eliminate the need to argue over the allegation's contradictions or the lack of evidence and more likely will gain a confession.

Katrina was an undergraduate student at a large state university. At the end of a weekend, her roommate returned to their dorm room to find Katrina gone. Her wallet, keys, purse, mobile phone, and laptop all remained in the room. There were no signs of a struggle or forced entry.



Most testimony by eyewitnesses tends to offer exclusively postoffense details and include only information provided by the offender.



The roommate notified local police who began an intensive abduction investigation. However, investigators immediately suspected a false allegation abduction case. They contacted NCAVC for a crime analysis. NCAVC personnel concurred that the case was a false allegation and provided an interview strategy to use when Katrina reappeared.

After a few days, Katrina returned. Interviewers gained a confession from her by using an empathetic approach in an hour-long interview. Beforehand, investigators determined that Katrina felt that her relationship with her boyfriend was at risk and that she desired his attention and sympathy. Further, authorities discovered that she previously made a false report of an assault that proved unfounded (lacking sufficient evidence).

Unfortunately, Katrina's case gained national media attention and caused a major upheaval in and around the university. And, the investigating police department depleted its annual overtime budget searching for her.

Possible Clues

Several indicators can help investigators identify a false allegation case. While none of these signs by themselves indicate a false allegation case, investigators should strongly consider a two-prong investigation with the corroboration of two or more. The offender may—

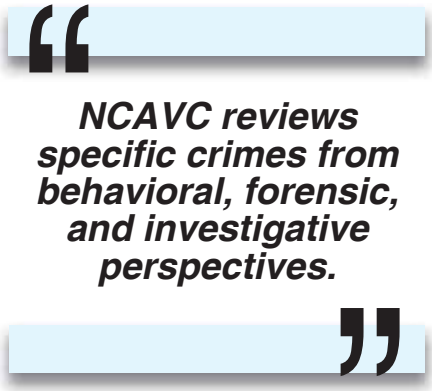
- continue to make inconsistent statements conflicting prior claims by the individual or information provided by witnesses;
- offer descriptions or circumstances of the reported offense that do not seem plausible or realistic;
- show deception on a polygraph or refuse to take one;
- have a history of mental and emotional problems or false allegations;

- make the allegation after a similar crime received publicity (suggesting modeling or a copycat motive in which the similarity to the publicized crime offers credibility); or
- provide an allegation that lacks substantiating forensic, physical, or medical evidence and does not agree with laboratory findings.

Source of Assistance

The FBI's NCAVC provides advice and assistance in the general areas of crimes against adults, counterterrorism and threat assessment, and crimes against children. Typical cases received for assessment at NCAVC include serial murder, kidnapping, serial sexual assault, stalking, threat assessment, domestic and international terrorism, and false allegation crimes. NCAVC staff members handle requests for assistance from both domestic and international law enforcement agencies.

NCAVC reviews specific crimes from behavioral, forensic, and investigative perspectives. This analytical process serves as a tool for client law enforcement agencies by providing them with an evaluation of the offense, as well as an understanding of the criminal motivations and behavioral characteristics of the offender. Staff members also conduct research in the area of violent crime from a law enforcement perspective to gain insight into criminal thought processes, motivations, and behaviors. NCAVC shares its findings with the law enforcement community through publications, training, and application to the investigative and operational functions of the center.



Personnel typically consult on cases, such as false allegation crimes, when requested by the investigating agency. NCAVC will assist by providing behavioral analysis and investigative and interview strategies. Only law enforcement agencies and prosecutor's offices can receive services from NCAVC.

Conclusion

Although false allegation adult crimes tend to be the exception, rather than the rule, these cases present serious concerns to law enforcement. Investigators find them difficult and frustrating. Officers risk being accused of not treating crime victims properly by prematurely labeling their allegations as false or by being unable to resolve the case. Further, a tremendous amount of department resources (which could be applied to real victims of real crimes), such as overtime, forensic budgets, and work hours, can be wasted on them.

Realizing how to identify false allegation crimes by using the two-prong investigation and developing the appropriate interview strategy based on the offender's true motivations/life problems allows investigators to more easily and quickly resolve these cases. This will save significant department resources and put the community at ease.✦

Endnotes

[1] K. Mohandie, C. Hatcher, and D. Raymond, "False Victimization Syndromes in Stalking," in *The Psychology of Stalking: Clinical and Forensic Perspectives,* ed. R. Meloy (San Diego, CA: Academic Press, 1998), 225-255.

[2] T.P. Carney, *Practical Investigation of Sex Crimes* (Boca Raton, FL: CAC Press, 2004); and E.J. Kanin, "False Rape Allegations," *Archive of Sexual Behavior* 23, no. 1 (1994): 81-92.

[3] J. McNamara, S. McDonald, and J. Lawrence, "Characteristics of False Allegation Adult Crimes," *Journal of Forensic Science* 57, no. 3 (May 2012): 643-646.

[4] Ibid.; and J.M. Taupin, "Clothing Damage Analysis and the Phenomenon of the False Sexual Assault," *Journal of Forensic Science* 45, no. 3 (2000): 568-572.

Falling Prey to Posturing

By Gary R. Rothwell, DPA

Posturing is an understated, preventable mistake. Sometimes, crime scene investigators are insecure or fearful of not measuring up. They may attempt to appear confident even when they are not. Herd behavior occurs, and responders blindly follow the loudest officer's theories and declarations, resulting in posturing.

Posturing is how we present ourselves to others. We attempt to appear in the most favorable light. At crime scenes, there are two officer postures—silence and pronouncing. Silence entails remaining quiet until our wits return, enabling us to deal with the issue at hand. Pronouncing involves loudly proclaiming assertions to attempt to convince others that we are competent.

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These pronouncements sometimes are wrong. However, other individuals are not comfortable challenging them. The person who pronounces becomes the unofficial leader of an investigation, whether a detective, coroner, assistant prosecutor, or, even, a journalist. The result is wasted time and resources.

Posturing is not limited to crime scenes. It occurs in situations of uncertainty because unsure individuals do not want to appear stupid. It is human nature to agree with the person who is posturing, even when common sense suggests acting otherwise. Leadership entails recognition of these insecurities, awareness of the potential peril, and willingness to question unsupported opinions.

Often, silent officers need time to gather composure and regain confidence in their abilities. Leaders who detect and break the pronouncing posturing behavior can allow these individuals to have the time they need.

Challenging the dominant opinion tactfully requires fortitude and depends upon the leader's personality. Saying "let's think about this" subtly puts the onus on pronouncing posturers to defend their assertions and provides an opening for others to question them. Confronting posturers is effective, but if done through ridicule or embarrassment, there is a risk of backlash. Law enforcement leaders who recognize and stop this behavior avoid a mistake made by many, but admitted by few—falling prey to posturing.✦

Special Agent Rothwell heads the Perry office of the Georgia Bureau of Investigation.

Perspective

Redefining Police Power

By Stephen M. Ziman, M.S.

Police officers exercise their power in different ways. Sometimes they wear riot gear and carry high-powered weapons, sledgehammers, battering rams, and hooligan tools. Other times, officers may be in a nonthreatening stance in front of a once-unruly crowd, speaking in a calm manner to defuse the situation.

Some people envision positive images of law enforcement, while others visualize notions that are more negative. Diversity of opinion exists among the public, and some citizens ask whether the police always are justified in their actions. While such questions are inevitable and understandable, officers know the use of force often becomes necessary.

Officers may encounter citizens who have little control of their emotions, are under the influence of alcohol or other drugs, suffer from mental illness, or, simply, do not want to go to jail. Police officers must consider these factors, in addition to politics, media, statistics, and bias.

Redefinition of Power

Law enforcement agencies have a duty to redefine what real might means and to use this authority to build as ideal a relationship as possible between officers and the communities they serve. Redefining police power begins with individuals who already possess the necessary tools. This capability is beneficial both on and off the job.

By employing a few critical techniques, police can use their influence most appropriately, avoid common mistakes, and, ultimately, succeed on the job. Doing the best work is a matter of following

specific rules that do not change and applying those rules to any situation, anytime, and anywhere. To learn these important methods, officers must know themselves and their communities.

Change and Improvement

Police officers determine their own success, although they must remain aware of how they exercise their power. Officers commit to a cycle of self-improvement. Individuals who become law enforcement officers grow to become different people. They change, and the community changes with them. Police officers can use their power effectively. Citizens and law enforcement officers can work together to better the world.

Eager to improve, police officers often desire additional training. In fact, most officers want to learn. Like professional athletes, committed law enforcement officers expect to achieve their goals. They strive to be the best at what they do.

Understandably, there may be obstacles along this path to self-discovery and knowledge. Once officers commit to change and begin to look within, they discover a variety of emotions. These feelings exist, are real, and affect them every day. However, police officers can be taught to appropriately digest and deal with the emotional impact of the job.

Law enforcement officers learn to understand the law as well as to skillfully fire weapons, write reports, and abide by prescribed safety procedures, but they must know themselves to expand their arsenal of knowledge. Change and improvement begin with the self. Police officers need to realize this and learn to be happy with who they are.

During this process of self-examination, it is wise to adopt a personal code of honor. When honor serves as the foundation of a police officer's life, the officer is on the right path. But, what is honor? Honor may be defined as esteem or personal integrity. In other words, it means respecting oneself and, as a natural extension of that, respecting others.

Qualities of a Winner

In addition to honor, winners possess certain qualities. These include positive self-expectancy, self-image, self-control, self-esteem, self-awareness, self-motivation, self-direction, and self-discipline.[1] Officers must be confident and successful.

The habits of highly effective people "embody the essence of becoming a balanced, integrated, powerful person and creating a complementary team based on mutual respect. These are the principles of personal character."[2] They are "principles that shape who and what you are."[3]

Officers must analyze themselves to determine who they are. Once they have an understanding of self, they need to look outward, examine the community, and realize it is an extension of them. Once law enforcement personnel respect the community, that esteem will be returned. Following the "golden rule," police officers should treat the public as they, in turn, want the public to treat them.

Community Relationships

Police officers confront issues every day. They deal with personal stressors that can challenge

Mr. Ziman, a retired sergeant with the Aurora, Illinois, Police Department, is director of security at a private security and consulting firm and an associate professor of criminal justice at Aurora University.

relationships with the community. Everyday concerns, such as preserving a marriage, raising a family, attending additional schooling, or negotiating the politics of the job, can compound adverse situations.

Officers bring preconceived beliefs and emotions to every contact with the community, just as citizens bring their ideas and feelings. Everyone has bad days; however, with empathy and compassion, police officers can determine why individuals are upset, what they are thinking, or how they are feeling. With this knowledge, they can make that contact successful.

When law enforcement officers realize the relationship with the community needs improvement, they must act. Police officers can make a difference, and the need to do so is important. Before knowing the community, officers must begin by understanding themselves.

> **"Policing is successful when officers empathize with members of the public and recognize their feelings, wants, and needs."**

Policing is successful when officers empathize with members of the public and recognize their feelings, wants, and needs. Real power comes when police officers reject stereotypes, refute ignorance, think creatively and compassionately, and do what is right. This is the criminal justice road to success.

Crime never may be totally eradicated; however, circumstances can be made better. Community policing, partnerships, and problem solving have improved safety and quality of life. When analyzing the moral climate of police work in relation to the community, it appears that law enforcement is on the right path.

No matter what, officer safety always must come first. Police officers should endeavor to do an effective job; they must do what it takes to resolve community situations in a positive way. Striving for perfection and aiming for excellence will bring law enforcement agencies and neighborhoods closer together. A solid relationship with the public is important. People will understand and respect police officers, and their expectations will become the same. Willingness to learn and the ability to become sympathetic and responsive to the community hold power.

Knowledge of Oneself

Law enforcement personnel must give their best every day. Police officers who enjoy their work and receive support from their supervisors become natural leaders in the department. Officers reap benefits when they enjoy their lives and engage in their profession. The knowledge of oneself, not the raises, bonuses, and gestures from the public, is the true reward.

The secret to law enforcement is recognizing the humanity of self and others in the community. In one manner, law enforcement is a business in which success depends on respect. With mutual courtesy and support, everyone benefits. The keys are being self-aware and following the golden rule.

Officers who believe knowledge brings rewards are successful, satisfied with their positions, happy, and optimistic. They help others, conduct themselves appropriately, and bring positive attention to their departments. These police officers are in control of emotional baggage. They know who they are, and they are true servants of their community.

Conclusion

Law enforcement agencies need to evolve and progress. They have a responsibility to their officers and the citizens they serve. Departments need to instill reciprocal empathy, compassion, and partnership between police and the community. Law enforcement agencies dedicated to this relationship find the time and energy to improve. Now is the time for officers to change and progress both personally and professionally. This is what it means to mature and develop a sense of self. Law enforcement officers and agencies always can improve.

Officers should engage in ongoing training that encourages them to analyze their motivation along with that of the community. They need to develop a better understanding of human nature and learn to be patient with one another.

The days of merely responding to calls have ended. Today is the day to learn about self and community and to strive for excellence in law enforcement. Now is the time to cultivate knowledge and redefine true police power.✦

Endnotes

[1] Denis Waitley, *Psychology of Winning: The Ten Qualities of a Total Winner* (Chicago, IL: Nightingale-Conant, 1983).

[2] Stephen R. Covey, *The 7 Habits of Highly Effective People* (New York, NY: Free Press, 2004).

[3] Stephen R. Covey, *The 8th Habit, From Effectiveness to Greatness* (New York, NY: Free Press, 2005).

The author thanks Teri Fuller, associate professor of English, Waubonsee Community College, Sugar Grove, Illinois, for her contributions to this article.

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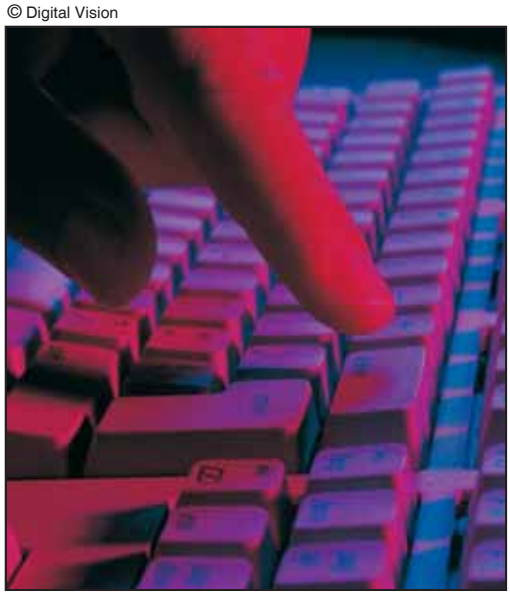

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ViCAP Alert

Attention

Violent Crime, Sex Crimes Units, and Crime Analysis Units

SEXUAL ASSAULT CASE BOULDER COUNTY, COLORADO

Date:	June 17, 2012
Time:	2200 hours
Location:	Boulder County, Colorado South Foothills Highway (Highway 93), south of Boulder
Weapon(s):	Black semiautomatic handgun
Offender:	Unknown, W/M, approximately 5'11" No further description
Vehicle Description:	Late model Jeep Cherokee, or similar vehicle Color: Grey or blue with cloth interior

CASE SUMMARY

On Sunday, June 17, 2012, at approximately 2200 hours, a female was sexually assaulted on the shoulder of South Foothills Highway (Highway 93), just south of the Boulder, Colorado, city limits. The victim was lost and had stopped on the highway shoulder to update her GPS. The offender approached her driver's side window and asked if she was OK. He then ordered her out of the vehicle and displayed a handgun, possibly a compact, black semiautomatic. The suspect forced the victim to move to the backseat of his vehicle, described as a late model Jeep Cherokee or similar vehicle, gray or blue in color with cloth fabric. He then sexually assaulted her. After the assault, the offender ordered the victim out of the car and left her at the side of the road. The suspect last was seen making a U-turn and driving back toward Boulder.

According to the victim, she did not recall seeing the suspect's vehicle on the shoulder when she first stopped, and she did not see it pull up behind her. The description of the suspect is vague. It is believed that he is a white male, approximately 5'11" in height.

To provide or request additional information, please contact Detective Mark Spurgeon, Boulder County, Colorado, Sheriff's Office at 303-441-3615 or the FBI's Violent Criminal Apprehension Program (ViCAP) at 800-634-4097 or *vicap@leo.gov*. Contact ViCAP for information on how your agency can obtain access to the ViCAP Web National Crime Database and view this case.

Research Forum

The Attitudes of Police Managers Toward Intelligence-Led Policing

By Scott W. Phillips, Ph.D.

Police departments routinely improve their effectiveness and efficiency. They develop new strategies and tactics for reducing crime and protecting the public. When implemented at street level, even with proper planning, some strategies pose problems. Departments use simplistic explanations, such as lack of resources, to explain strategic or tactical failures.[1] Often, a more complex explanation exists. Based on past examinations of policing strategies, implementation problems occur when rank-and-file officers are not included in the planning process. Mid-level police managers and street-level officers receive instructions from administrators to execute the strategy.

Evolution of Policing Strategies

Policing strategies have evolved over the years, with intelligence-led policing (ILP) becoming the most current approach to improve police response time. ILP still is in its early stages of development and understanding—not all agencies have adopted it.[2] Examination of attitudes and opinions of police managers can help identify hurdles. Based on research findings, when initiating ILP, top police administrators receive the information they need to anticipate problems and understand the mind-set of supervisors.

Strategy changes come from goal shifts. For example, Sir Robert Peel organized the London Metropolitan Police to focus on crime prevention, rather than response.[3] Technological developments, such as telephones and cars, caused improvements. These advances reduced response time and expanded the area an officer covered during patrol.

Substantive changes in American policing came early in the 20th century. In the 1930s, it

began shifting toward a professional model where officers are hired strictly on qualifications. Agencies started developing standard operating procedures for structure and guidance.[4] Police have used different tactics to improve effectiveness.

In the 1970s, team policing motivated officers working in a ridged military-style organization.[5] Community policing in the mid-1980s showed that prevention of serious crime required addressing its root causes, such as low-level disorders or minor offenses. This strategy has led to stronger working relationships between police and the community, which is necessary for effective crime prevention.

Related to community policing, problem-oriented policing (POP) requires the dissection of a problem to identify its fundamental causes and develop a specific targeted response.[6] Developed in the 1990s in the New York City Police Department, Compstat, which compares statistics used to track data, is an agencywide strategy for keeping police managers accountable for crime in their precincts.[7] This method consists of four components—accurate and timely intelligence, rapid deployment, effective tactics, and relentless follow-up. Natural progression and tactical similarities exist in these strategies.

Team policing uses decentralization to respond to citizens' needs.[8] Decentralization allows greater community engagement to identify crime and develop long-term quality of life improvements.[9] POP requires community involvement to indicate problems and solutions. This strategy involves movement of officers beyond response to individual incidents.

Police should view crime as behavior resulting from problems or underlying causes, either criminal or noncriminal. Systematic analysis of basic issue information and data related to those underlying problems is key to solving them.[10] Compstat requires substantial criminal activity analysis for police or social service agencies to expend resources on the problem.

Innovative Approach

ILP is an innovative strategy for advancing crime prevention efforts. It is "a strategic, future-oriented, and targeted approach to crime control, focusing upon the identification, analysis, and management of persisting and developing problems and risks."[11] ILP does not involve storing crime data; it integrates them into the strategic police mission, including control of various crimes and terrorist activities.[12]

This program shares several characteristics with other policing strategies. Still in its developmental stage, it has not matured enough for sufficient examination to determine its success. This may cause agencies to wait until it has worked through its growing pains in other organizations. ILP will spread despite its likely hurdles.

Implementation Issues

The intent of these various approaches is to improve policing. Evaluations of these methods show that bureaucratic law enforcement agencies

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change slowly. Police departments possess strong organizational cultures that hold tightly to traditional strategies and tactics. Research has indicated resistance by mid-level managers to new strategies that may cause some loss of authority.[13]

When top-level administrators enact policing strategies and street-level officers employ them, research has shown that mid-level managers influence the implementation. Therefore, examining the attitudes and opinions of these managers toward ILP is necessary. With this information, it is possible to forecast the strategy's success or failure.

> "Police should view crime as behavior resulting from problems or underlying causes, either criminal or non-criminal."

Research

The FBI's National Academy (NA) in Quantico, Virginia, provides graduate-level instruction and professional development to command-level municipal, state, county, and federal officers. The goal is to improve the administration of justice by raising policing standards, knowledge, and cooperation.

In April 2011, police managers participated in an ILP and crime analysis study. Two hundred forty six NA students received questionnaires. Two hundred eighteen surveys were completed and used in this study. The officers canvassed represented a variety of police agencies, communities, experience and education levels, and ranks. Work experience ranged from 6 to 35 years, and supervisory experience extended from 1 to 28 years. Officers attending the NA are not a representative sample of the United States; however, in other studies using these students, the participant diversity was similar.[14]

Survey questions were based on general strategic and ILP implementation research.[15] In this analysis, the respondents' attitudes toward ILP were encouraging.

Attitudes Toward ILP

When developing programs and strategies, mid-level police managers are an important link between administrators and street-level officers. Understanding these managers' views is important because those judgments set the tone. Over 85 percent of respondents agreed or strongly agreed that top-level administrators recognize the need for crime analysis information. Sixty-one percent agreed or strongly agreed that officers understand the value of analysis reports. This is a positive attitude, although managers view police administrators and street-level officers differently.

Resources

Studies indicated that resources, such as funding and personnel, often are restricted and limit implementation of new programs.[16] This must be a consideration with specific crime analysis components. Funding, personnel, training, and technology require dedicated resources that otherwise could be allocated for traditional policing tactics.

According to the NA study, two-thirds of mid-level managers disagreed or strongly disagreed that funding for crime analysis could be used better for patrol or investigation. This finding indicated that managers view crime analysis funding as an acceptable allocation of resources.

Police Culture

Traditional strategies and tactics sustain the culture of policing.[17] Law enforcement values

"real police work," rather than activity considered to be outside normal police behavior. The culture traditionally has valued random patrol, rapid response to service calls, and arrests of offenders over long-term focus and time-consuming inquiry needed for crime analysis.

Research indicated that less than half of crime analysts feel accepted as part of police culture. They believe supervisors, not patrol officers, understand the analysts' role.[18] However, 86 percent of NA police managers surveyed agreed or strongly agreed that analysts are accepted. This result is encouraging. Managers can serve as intermediaries and improve officer-analyst relationships. This may motivate analysts to provide high-quality reports and encourage street-level officers to use analysis.

> "ILP is an innovative strategy for advancing crime prevention efforts."

An important police supervisor role is officer motivator, particularly when changes occur in the organization or duties.[19] Supervisors accept crime analysis as part of the culture; 85 percent encourage officers to use intelligence reports. This finding, in addition to analysts' acceptance, is positive news. With supervisors who are optimistic toward crime analysis, effective ILP implementation looks promising.

Training

Crime analysis training is necessary at all levels to educate and influence the culture to accept ILP.[20] Four percent of officers stated that they received sufficient guidance to be comfortable conducting crime analysis. Over 50 percent of supervisors reported obtaining enough instruction to understand it. Sixteen percent acquired ample training to make them aware; yet, 30 percent received no guidance.

According to this study, supervisors accept and promote crime analysis and reporting. This is encouraging considering managers received limited training. If instruction levels increase, ILP support may rise.

Conclusion

Mid-level police managers are important in implementing any new program. ILP is an innovative strategy for improved crime control and problem solving. Study results suggested that managers understand and appreciate intelligence-led-policing for its contributions. This means less resistance for implementation. Officers are the primary source of information for analysis and application. Success of ILP depends on mid-level managers and street officers meeting present and future challenges together. ✦

Endnotes

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[11] W. de Lint, "Intelligence in Policing and Security: Reflections on Scholarship," *Policing and Society: International Journal of Research and Policy* 16, no. 1 (2006): 1-6.

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[13] J.E. Deukmedjian and W. de Lint, "Community into Intelligence: Resolving Information Uptake in the RCMP," *Policing and Society* 17, no. 4 (2007): 239-256.

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[15] Based on his consideration of officer familiarity, the author used the term *crime analysis,* as opposed to the phrase *intelligence-led policing*, in the multiple survey questions.

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Wanted: Bulletin Honors

The *FBI Law Enforcement Bulletin* seeks submissions from agencies that wish to have their memorials featured in the magazine's Bulletin Honors department. Needed materials include a short description, a photograph, and an endorsement from the agency's ranking officer. Submissions can be e-mailed to *leb@ic.fbi.gov* or mailed to Editor, *FBI Law Enforcement Bulletin,* FBI Academy, Quantico, VA 22135.

Bulletin Alert

Deployment of Spike Strips

According to FBI reporting, 2011 represented a deadly year for law enforcement officers killed while deploying spike strips to end dangerous high-speed pursuits. The use of spike strips began in 1996. Since that time, drivers have struck and killed 26 law enforcement officers, 5 in 2011—the most since 2003, which also featured 5 officer deaths.[1] In at least one of the 2011 deaths, an offender intentionally struck an officer.

To place such tire-deflation devices, "the officer must be positioned somewhere ahead of the chase... and park his vehicle on the side of the road, exit the vehicle, and then deploy the strip across the roadway in front of the suspect."[2] And, doing so "is a real danger for law enforcement officers. Offenders who are fleeing from pursuing officers have no concern for other motorists, let alone the officers chasing them or attempting to stop them."[3] According to one expert in law enforcement driver training and tire-deflation devices, "While these tools can ultimately make a pursuit safer for the community, there is an element of danger in using them. Officers should take great caution when utilizing any tire-deflation device."[4]

In view of the dangers associated with spike strip deployment, law enforcement agencies should weigh other options, such as the pit maneuver, to end high-speed chases. Departments also can consider the increased use of aerial surveillance to track an offender's location relative to that of an officer placing the spike strip. Moreover, radio communication could help confirm that a subject is too far away to reach the location of an officer during deployment. Further, new technology that could disable cars involved in high-speed chases may reduce the risk to officer safety.✦

Endnotes

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Gregory R. McMahon, an intelligence analyst in the FBI's Violent Criminal Threat Section, Criminal Investigative Division, prepared this Bulletin Alert.

Notable Speech

Law Enforcement Do It J-U-S-T-I-C-E

By G.B. Jones, M.A.P.A., M.A.

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Congratulations, graduates, and thank you for inviting me to speak to you today. Thank you, family, friends, instructors, and law enforcement colleagues, for your presence here today. Your support helped get these graduates through their training, and your support will keep them grounded as they face the challenges of policing our neighborhoods and communities. What a great honor and opportunity to address you on this, the kickoff night of your new careers. Thank you, WCTC Fall Class of 2011, for your commitment to the cause of justice.

Honorable Profession

President Calvin Coolidge once said, "No one is compelled to choose the profession of a police officer, but having chosen it, everyone is obliged to live up to the standard of its requirements."[1] A commitment to the vocation of law enforcement is a commitment to justice. I'm talking about *justice:* J-U-S-T-I-C-E. Not all people are cut out for police work, and not all people read those letters the same way. But, to those of us who have answered the call to become police professionals, those letters represent a commitment that is central to who we are, how we act, and what we represent.

Justice is an essential component of the democratic rule of law, and it is a fundamental responsibility of government. In fact, our system of laws, law enforcement, and courts is called the *justice* system.

- I work for and represent today the FBI—a component of the U.S. Department of *Justice*.
- Not surprisingly, The Pledge of Allegiance ends with "and *justice* for all."
- Finally, Superman, Wonder Woman, Aqua Man, and all the other Superfriends were headquartered at the Hall of *Justice*. Coincidence? I think not.

Those of you in this class have chosen to pursue the most noble of all professions and, in so doing, have dedicated yourselves to the service of justice.

Nearly 20 years ago, I met someone who had a very strong sense of justice and dreamed of one day becoming a police officer. When we met, I was a rookie cop working the evening shift on a very cold Minnesota December night. It was so cold, the fashion police took the night off. In fact, it was so cold, I was wearing one of those furry cold weather caps made famous in the movie *Fargo*. You know the one—fuzzy ear flaps with a badge on the forehead. But, as I walked into the police department with my field training officer (FTO), I noticed a striking blonde police reservist talking with several other officers. I never had met her before, but I'll never forget the first words she ever spoke to me: "Nice dork hat." Of course, my reply to my FTO was "Who's the loudmouth in the corner?" I didn't yet understand that loudmouth was to be my wife. A year later, I pulled her over on a traffic stop and proposed to her. We celebrated our

18th anniversary this year. That is justice. Just 7 months ago, and 20 years after she set her sights on becoming a police officer, she was sworn in as a rookie patrol officer in the Town of Beloit. Winter on the night shift is quickly approaching, and I just bought her a fuzzy hat with ear flaps. Now that *truly* is justice.

High Standards

Graduates, as you start your law enforcement careers, I ask that you keep justice at the forefront of your mind: J-U-S-T-I-C-E.

- J: Be *just*. Be fair and open-minded. Be even-handed and professional in your dealings with everyone. Honor your family, your partners, your bosses, and your public. Respect the Constitution, and protect civil rights. Demonstrate your commitment to others by treating them fairly, without bowing to pressure, bias, or prejudice. Being just means not being judgmental. Your job is to introduce others to the justice system. It is not to judge them or convict them. Be just.

Assistant Special Agent in Charge Jones of the FBI's Milwaukee, Wisconsin, office delivered this speech at the fall 2011 graduation ceremony of the Waukesha County Technical College Law Enforcement Recruit Academy in Pewaukee on December 8, 2011.

- U: Be *understanding*. People do stupid things. You will do stupid things. Stupid things will happen. Look for the motives and the motivations. Work to understand them. Be even tempered. Give the benefit of the doubt when it is warranted. Be empathetic. If you can't walk a mile, take at least a few steps in someone else's shoes. It is not us versus them. We *are* them. Be understanding.
- S: Be *service-minded*. You have committed yourself to a calling that is greater than yourself. Don't forget that. You understand now that this is a service business. But, with the long hours, late shifts, missed holidays, poor diets, and stress, you may be tempted to forget that. Your jobs exist because there are people who need your service. Not all of them will thank you for it. In fact, most will not. But, many will, and the silent majority is behind you and will remain so if you work to keep them there. Be service-minded.
- T: Be *trustworthy*. Your word is your honor. Your actions are your currency. It has taken you a lifetime to build your character. It will take you a minute to destroy it. Be trustworthy, and people will trust you. Work to earn and maintain that trust. Respect your ethical compass. You know the difference between right and wrong. Trust your instincts, and do the right thing. Be trustworthy in all you do—your family, your partners, and your public expect it. Your leaders, lawmakers, and the courts demand it. Set the example; don't become the example. Be trustworthy.
- I: Be *intelligent*. That means more than just being smart and being willing to learn. It means identifying and using intelligence to inform your decision-making and your policing strategies. You are entering law enforcement in the post-9/11 world, and intelligence is a part of that culture. What you see and what you learn on the street can inform and

impact you and your department, but it also can impact our national security. You have access to more information and intelligence networks than ever before. Use that access. Talk *to* people, not *at* people, and you will develop a human intelligence network. Leverage that network. Share that human intelligence. Use it to contribute to the homeland security intelligence apparatus. The security of our families, our communities, and our nation demands it. Be intelligent.

- C: Be *collaborative*. There was a time when law enforcement was not considered a team sport. One riot, one ranger. You and your squad car, alone against the world. Sure, you had partners out there, but they were to meet for coffee, not to drag around with you to your good calls. Firefighting, by contrast, always has been a team sport. Four firefighters respond to a fire in one truck. They work together to put the wet stuff on the red stuff, then they go back to the station and polish the truck. In the post-9/11 world, police officers have to be collaborative. You have to be a team player. Police officers today are asked to be part doctor, part lawyer, part psychiatrist, part teacher, part garbage collector, and at least part law enforcer. You've met some great friends and had some great instructors during the last 13 weeks. Build and maintain those networks. But, expand your networks through collaboration. Meet firefighters, teachers, emergency professionals, public health officials, military and National Guard members, and, yes, even federal agents. Work to understand who they are and what they do. Look for the gaps and the seams in our nation's security and work together to close them. Be collaborative.
- E: Be *enthusiastic*. You've been given the opportunity to do the greatest job in the world. Appreciate it. Work hard in whatever you do, and have fun while you are doing it. As a police officer, you are a role model. Be a positive one. Be busy—stop lots of cars and make lots of contacts. But, make them positive contacts. That traffic stop may be 1 of 10 or 12 for you that day. But, the person you encounter will remember that one stop forever. Be respectful with your enthusiasm. Never, ever forget that nearly every crime has a victim. Protect the weak, but don't be afraid to challenge those who are strong when they are wrong. With the great days, you're going to have some bad days. You'll have some trying days and some scary days. But, as a professional, you can control what that looks like on the outside. Be enthusiastic.

> **"Be just, understanding, service-minded, trustworthy, intelligent, collaborative, and enthusiastic."**

Conclusion

Congratulations on your graduation, and good luck as you move forward with your careers. Be just, understanding, service-minded, trustworthy, intelligent, collaborative, and enthusiastic. That is the practice of justice. Use what you've learned, and keep on learning. Practice your skills. Be safe. Law enforcement is not a job. It is a calling. You've committed yourself to that responsibility. Now, go do it justice! ✦

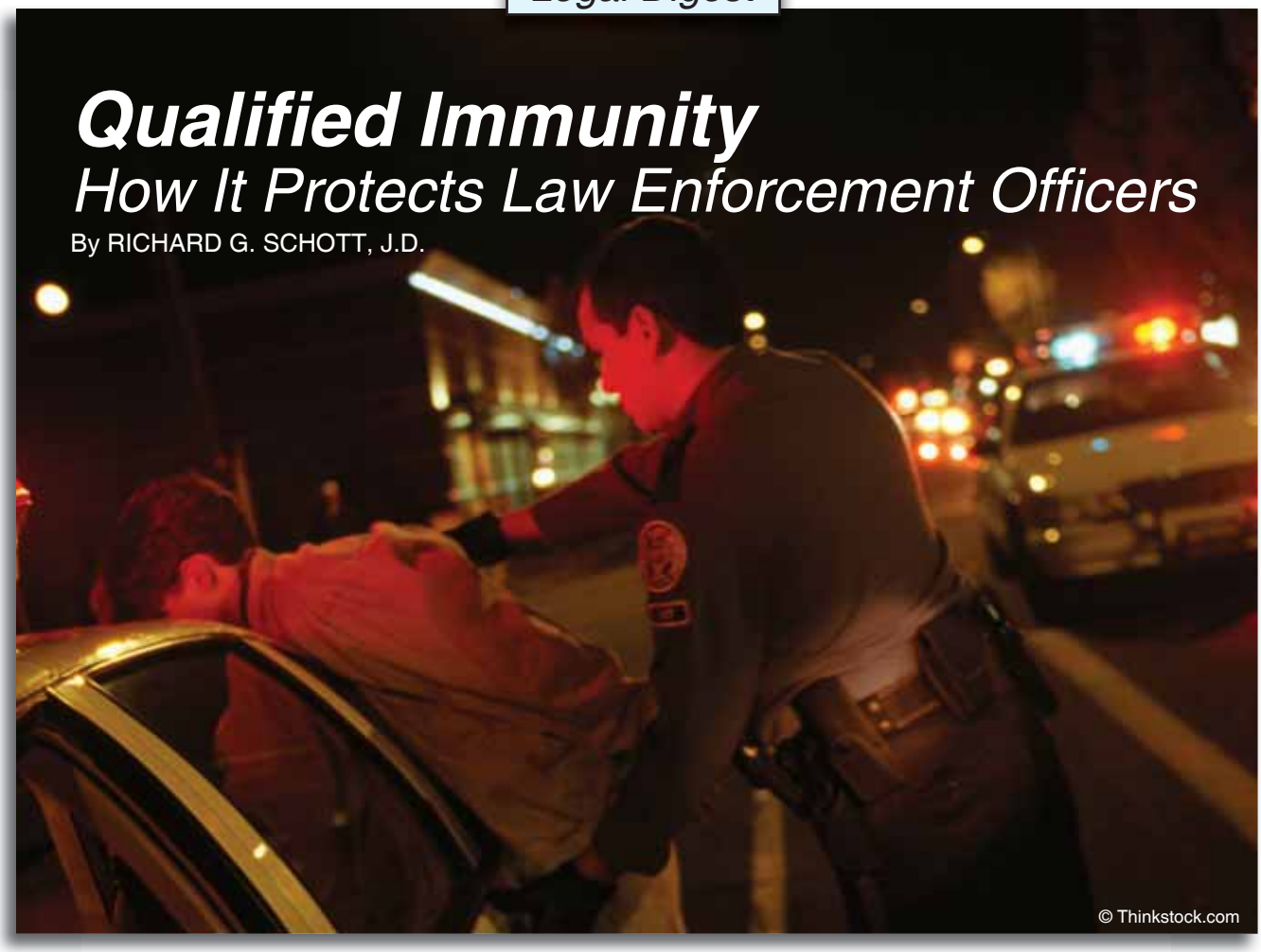
Endnotes

[1] *http//josephsoninstitute.org/quotes/quotations.php?q=Policing,%20crime* (accessed January 4, 2012).

Qualified Immunity

How It Protects Law Enforcement Officers

By RICHARD G. SCHOTT, J.D.



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Law enforcement personnel expose themselves to risks every day. Those risks include the possibility of being sued civilly for something they did while performing law enforcement duties. While acting in the scope of their employment, federal, state, and local officers can be sued for intentionally violating a person's constitutional rights.[1]

Like anyone else facing a lawsuit, officers have various defenses available to assert in their defense. Of course, these include all of the traditional defenses available in a civil case.[2] Additionally, law enforcement personnel are protected by the doctrine of qualified immunity. In 1982, 11 years after its *Bivens* decision, the Supreme Court provided the modern standard for determining whether a government employee is entitled to qualified immunity.[3] Since then, the test for whether qualified immunity is appropriate in a particular case has been applied differently, but the scope of its protection has remained unchanged. Over the past 12 years, the Supreme Court has provided additional guidance regarding the protection afforded by qualified immunity, including three cases decided this past term.

This article will provide a historical discussion of the doctrine of qualified immunity, review the changes the Supreme Court has provided to determine whether qualified immunity should apply in a particular case, and summarize three very recent Supreme Court cases addressing this issue and how these decisions impact the law enforcement community.

QUALIFIED IMMUNITY DOCTRINE

Clearly Established Law

While law enforcement officers recognize the inherent risks of their occupation, they should be comforted by the description given by the Supreme Court as to the effect of the qualified immunity doctrine on one of those inherent risks—that of being sued civilly. In *Harlow v. Fitzgerald,* the Court explained that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[4] The plaintiff in *Harlow,* A. Ernest Fitzgerald, sued, among others, President Richard M. Nixon and one of his aides, Bryce Harlow, alleging that he was dismissed from his employment with the Air Force in violation of his First Amendment and other statutory rights.

The defendants sought immunity from the lawsuit. While ruling on the issue of immunity, the Supreme Court distinguished the president from his aide. First, the Court noted that its "decisions consistently have held that government officials are entitled to *some form* of immunity from suits for damages. As recognized at common law, public officers require this protection to shield them from undue interference with their duties and from potentially disabling threats of liability."[5] Justice Powell, writing for the Court, continued by recognizing that

> [o]ur decisions have recognized immunity defenses of two kinds. For officials whose special functions or constitutional status requires complete protection from suit, we have recognized the defense of "absolute immunity." The absolute immunity of legislators, in their legislative functions, and of judges, in their judicial functions, now is well settled. Our decisions also have extended absolute immunity to certain officials of the Executive Branch. These include prosecutors and similar officials, executive officers engaged in adjudicative functions, and the President of the United States. For executive officials in general, however, our cases make plain that qualified immunity represents the norm. [W]e [have] acknowledged that high officials require greater protection than those with less complex discretionary responsibilities.[6]

Based on this reasoning, Harlow—Nixon's aide—was entitled not to absolute immunity, but, rather, to qualified immunity.

The Court then reexamined its earlier treatment of qualified immunity. Prior to this case, qualified or "good faith" immunity included both an objective and a subjective aspect. The subjective aspect involved determining whether the government actor in question took his "action *with the malicious intention* to cause a deprivation

> ***"…law enforcement personnel are protected by the doctrine of qualified immunity."***

Special Agent Schott is a legal instructor at the FBI Academy.

of constitutional rights or other injury."[7] This subjective determination typically would require discovery and testimony to establish whether malicious intention was present. Having to go through the costly process of discovery and trial, however, conflicted with the goal of qualified immunity to allow for the "dismissal of insubstantial lawsuits without trial."[8]

Recognizing this dilemma, the Court altered the test to determine whether qualified immunity was appropriate. The new test, as stated earlier, is that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[9] By applying the reasonable person standard, the Supreme Court established, for the first time, a purely objective standard to determine whether granting a government official qualified immunity was appropriate.

While *Harlow* did not involve a law enforcement officer's actions, the decision is significant because law enforcement officers are government officials who perform discretionary functions and may be protected by qualified immunity. This shield of immunity is an objective test designed to protect all but "the plainly incompetent or those who knowingly violate the law."[10] Stated differently (but just as comforting to law enforcement officers), officers are not liable for damages "as long as their actions reasonably could have been thought consistent with the rights they are alleged to have violated."[11] As protective as the language in these post-*Harlow* cases would suggest qualified immunity is, qualified immunity is not appropriate if a law enforcement officer violates a clearly established constitutional right.

> ***While law enforcement officers recognize the inherent risks of their occupation, they should be comforted by the…effect of the qualified immunity doctrine….***

For example, in *Groh v. Ramirez,* a special agent for the Bureau of Alcohol, Tobacco, and Firearms (ATF) applied for and received from a U.S. magistrate judge a search warrant authorizing the search of a home located on a ranch.[12] The purpose of the search was to locate and seize a "stockpile of firearms."[13] While the magistrate judge had reviewed a detailed itemization of the firearms in the application for the search warrant, the search warrant itself did not include any such itemization. Rather, the ATF agent inadvertently "typed a description of respondent's two-story blue house rather than the alleged stockpile of firearms."[14]

The homeowner sued the ATF agent for a violation of his Fourth Amendment right to be free from "unreasonable searches and seizures."[15] Of course, the Fourth Amendment also mandates that search warrants "particularly describ[e] the place to be searched, and the *persons or things to be seized*."[16] Despite this clear mandate, the ATF defendant to the civil lawsuit argued that he was entitled to qualified immunity because even if the improperly written search warrant constituted a Fourth Amendment violation, his failure to include a particular description did not violate a clearly established right at the time. The Court quickly dispatched the notion that the inadequate warrant was simply a "technical mistake or typographical error" that did not rise to the level of a constitutional violation.[17] Finding the violation, the Court turned to whether the right was clearly established at the time the violation occurred.

The Supreme Court used decisive language to show that the

homeowner's rights had been clearly established before the violation in this particular case occurred. The Court pointed out that "the particularity requirement is set forth in the text of the Constitution."[18] The Court then referred to a previous decision by the Court in this area, stating, "as we noted nearly 20 years ago in *Sheppard*: 'The uniformly applied rule is that a search conducted pursuant to a warrant that fails to conform to the particularity requirement of the Fourth Amendment is unconstitutional.'"[19] Accordingly, the request for qualified immunity was rejected.

Constitutional Violation/ Objective Reasonableness

Even if the law is clearly established, the law enforcement officer is entitled to qualified immunity if there was no constitutional violation in the first place. For example, in *County of Sacramento v. Lewis*, the deputies involved in a fatal high-speed pursuit were sued by the decedent's parents for a due process violation.[20] The alleged constitutional violation was due process because the decedent was not intentionally seized by the deputies, but, rather, accidentally struck by one of the deputies after the motorcycle being pursued crashed in front of the pursuing deputies. The decedent, in fact, had merely been a passenger on the motorcycle. The Supreme Court afforded the deputies qualified immunity because even when based on a favorable view of the plaintiffs' allegations, there simply was no violation of due process. The court noted that to violate the Due Process Clause, the deputies had to intend to cause harm, and that had not been the case.[21] Rather, the [deputy's] "instinct was to do his job as a law enforcement officer, not to induce [the decedent's] lawlessness, or to terrorize, cause harm, or kill."[22]

While the two determinations into whether qualified immunity should apply have been well-settled, which of the two separate inquiries to analyze first has not been.

APPLICATION OF THE QUALIFIED IMMUNITY TEST

Almost 30 years after the Supreme Court provided the objective test to determine whether qualified immunity should be afforded a defendant, it provided specific, if only short-lived, guidance on how and in what order to apply the two-part test. In *Saucier v. Katz,* a protestor at an event that included Vice President Albert Gore, Jr., was arrested by a military police officer.[23] The arrested protestor sued the officer, alleging that during the arrest, excessive force was used, which violated his Fourth Amendment rights. The officer's request for qualified immunity was denied by both the district court and by the U.S. Court of Appeals for the Ninth Circuit.[24] In denying qualified immunity on the issue of excessive force, the Ninth Circuit first found that the "law governing the official's conduct was clearly established," focusing on the general right to be free from excessive force.[25] The Ninth Circuit then concluded that the reasonableness inquiry into the amount of force used should be determined by a jury, ruling out qualified immunity for the officer.

The Supreme Court disagreed with the Ninth Circuit and pointed out that its reasoning would contravene the purpose of granting qualified immunity at an early stage of court proceedings "so that the costs and expenses of trial are avoided where the defense is dispositive."[26] To satisfy this purpose, the Supreme Court ruled that the first inquiry into a request for qualified immunity

must be whether a constitutional right would have been violated on the facts alleged; then, and only if the answer to the first inquiry is affirmative, does the question of whether the right was clearly established at the time of the alleged violation have to be answered. The Supreme Court also disagreed with the Ninth Circuit's rationale that only a jury could decide whether the force used in this instance was excessive, making its two-step approach workable even in excessive force claims.[27]

While the Supreme Court's guidance in *Saucier* provided a mandatory two-inquiry test to be used for future qualified immunity cases and while that test was effective for the facts at hand, rigid compliance to the two-step inquiry soon fell out of favor. Lower courts struggled to apply *Saucier* because it was not always practical to decide whether a constitutional violation occurred before addressing whether the constitutional right at issue had been clearly established. While some lower courts began deviating from the Supreme Court's rigid two-inquiry approach, others were at least expressing frustration with it.[28] Even the Supreme Court itself did not always see fit to follow its own mandate. In *Brousseau v. Haugen*, another excessive force allegation against a law enforcement officer was resolved by affording the officer qualified immunity.[29] However, in finding qualified immunity appropriate, the Court deviated from its own pronouncement from 3 years earlier in *Saucier*. In a per curium opinion in *Brousseau*, the Court found in this case that the officer's use of force—shooting an unarmed but "disturbed felon, set on avoiding capture through vehicular flight"—fell in the "hazy border between excessive and acceptable force."[30]

> ***In an effort to mitigate the costs and burden of defending oneself from a lawsuit, government actors are entitled to assert immunity as a barrier to being sued.***

Because of the close-call nature as to whether the amount of force used was reasonable, the Court granted qualified immunity based on the lack of a clearly established right, rather than any possible constitutional violation or lack thereof. Based on the Supreme Court's earlier decision in *Saucier,* however, that was exactly the dilemma the Ninth Circuit found itself in when deciding *Brousseau*.[31] Recognizing that it was not only the Ninth Circuit Court of Appeals that found itself in the position—"unnecessarily to decide difficult constitutional questions when there [was] available an easier basis for the decision"—of whether qualified immunity should apply, the Supreme Court modified the mandatory formula it set forth in *Saucier*. [32]

In 2009, the Supreme Court decided *Pearson v. Callahan*.[33] The case involved the warrantless arrest of a subject at his home immediately following his sale of illegal drugs to a police informant. The arresting officers relied on the notion of "consent once removed" to make entry into the home following the informant's drug purchase. The arrested homeowner sued the arresting officers, asserting that the warrantless entry of his home was a Fourth Amendment violation, arguing that "consent once removed" was limited to an undercover officer being invited in and that it did not apply in cases where an informant was invited in.

The officers requested qualified immunity. The district court deemed that they were entitled to immunity. The U.S. Court of Appeals for the Tenth Circuit methodically applied the two-pronged inquiry handed down by the Supreme Court 6 years earlier and determined that the grant of qualified immunity was improper.[34] Recognizing that the "*Saucier* procedure has been criticized by Members of

this Court and by lower court judges, who have been required to apply the procedure in a great variety of cases and thus have much firsthand experience bearing on its advantages and disadvantages," the Court, in granting certiorari, "directed the parties to address the question whether *Saucier* should be overruled."[35] A unanimous Court softened the mandatory nature of the *Saucier* approach, receding from without totally abandoning it. Justice Alito, writing for the entire Court, stated that "[o]n reconsidering the procedure required in *Saucier*, we conclude that, while the sequence set forth there is often appropriate, it should no longer be regarded as mandatory. The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand."[36] Not surprisingly, in the case before them, the Court found the issue of qualified immunity easier to determine based on whether any violation (if one occurred at all) was of a clearly established right. Here, the Court found that at the time of the officers' actions, it was not clearly established that those actions were unlawful.[37]

With the now-flexible *Saucier* test in place for 3 years, the Supreme Court has ruled on three qualified immunity cases involving law enforcement/public safety personnel in just the past several months.

2012 QUALIFIED IMMUNITY CASES

In *Messerschmidt v. Millender,* the Supreme Court ruled that officers were entitled to qualified immunity.[38] Like the *Groh v. Ramirez* case discussed earlier, this case involved officers executing a search warrant later determined to be invalid.[39] A detailed review of the facts leading up to the civil lawsuit at issue in *Messerschmidt* is required to appreciate the Court's holding.[40]

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When Shelly Kelly decided to leave her boyfriend Jerry Ray Bowen, she requested the presence of Los Angeles County, California, Sheriff's Department officers while she packed her things because of Bowen's past violent actions against her and others. When the officers got called away, Bowen showed up, and a violent encounter ensued. Kelly was able to get to her car and attempted to flee. However, before she could, Bowen got a black, sawed-off shotgun with a pistol grip, ran in front of Kelly's car, pointed the gun at her, and told her that if she tried to leave, he would kill her. When she sped away, Bowen fired at the car five times, blowing out the car's left front tire, but did not prevent her escape. Kelly found police officers, described the incident, and mentioned that Bowen was a member of the Mona Park Crips—a local street gang—and provided a picture of Bowen.

The named defendant in the subsequent civil lawsuit, Detective Curt Messerschmidt, was assigned to investigate. Kelly provided to Messerschmidt the address of Bowen's foster mother as a probable location for him. She also advised him of Bowen's gang connections. Through independent investigation, Messerschmidt confirmed Bowen's connection to the foster mother's address and that Bowen was an active gang member. In reviewing Bowen's 17-page criminal history, Messershmidt learned that Bowen had been arrested on at least 31 occasions, including 9 times for firearms offenses.

Based on his investigation, Messerschmidt obtained a search warrant for the foster mother's home, authorizing the search

for and seizure of, among other items, "All handguns, rifles, or shotguns of any caliber, or any firearms capable of firing ammunition, or firearms or devices modified or designed to allow it [sic] to fire ammunition. Any firearm capable of firing or chambered to fire any caliber ammunition. Articles of evidence showing street gang membership or affiliation with any Street Gang to include but not limited to any reference to 'Mona Park Crips,' including writings or graffiti depicting gang membership, activity, or identity."[41]

Messerchmidt prepared two affidavits to support his warrant request. The first described Messerschmidt's extensive law enforcement experience, including his lengthy work involving gang-related crimes. The second affidavit, which was expressly incorporated into the search warrant, described the incident between Bowen and Kelly in great detail, to include a discussion of the sawed-off shotgun used in the assault. The affidavit also requested that the search be allowed to take place at night because of Bowen's gang ties. "The affidavit concluded by noting that Messerschmidt 'believe[d] that the items sought' would be in Bowen's possession and that 'recovery of the weapon could be invaluable in the successful prosecution of the suspect involved in this case, and the curtailment of further crimes being committed.'"[42] Before submitting the application and affidavits to a magistrate, a sergeant and a lieutenant in Messerschmidt's department, as well as an assistant district attorney, reviewed Messerschmidt's work. A magistrate issued the warrant, and officers executed the search 2 days later. The officers, including Detective Messerschmidt, seized only the foster mother's shotgun, a box of .45 caliber ammunition, and a California Social Services letter addressed to Bowen.

> ***"...the law enforcement officer is entitled to qualified immunity if there was no constitutional violation in the first place."***

The Millenders (Bowen's foster mother and her daughter) subsequently filed a civil lawsuit in federal court suing, among others, Detective Messerschmidt, alleging that the search warrant at issue was invalid under the Fourth Amendment. The federal district court ruled against the individual defendants as to qualified immunity and found that the "warrant's authorization to search for firearms was unconstitutionally overbroad because the 'crime specified here was a physical assault with a very specific weapon'—a black sawed-off shotgun with a pistol grip—negating any need to 'search for all firearms.'"[43] The district court also found the warrant overbroad in that it allowed for the seizure of gang-related materials, but there "was no evidence that the crime at issue was gang-related."[44]

On appeal to the Ninth Circuit Court of Appeals, the three-judge panel reversed, finding that the officers were entitled to qualified immunity because "they reasonably relied on the approval of the warrant by a deputy district attorney and a judge."[45] However, the en banc Court of Appeals granted a rehearing and reversed the three-judge panel, denying qualified immunity because the affidavits and warrant "failed to 'establish probable cause that the broad categories of firearms, firearm-related material, and gang-related material described in the warrant were contraband or evidence of crime.'"[46]

The Supreme Court began its analysis of the qualified immunity issue by pointing out that "[w]here the alleged Fourth Amendment violation involves a search or seizure pursuant to a warrant, the fact that a neutral magistrate has issued a warrant is the clearest indication that the

officers acted in an objectively reasonable manner or, as we have sometimes put it, in 'objective good faith.'"[47] But, Chief Justice Roberts, writing for the majority, goes on to say that the magistrate's issuance of a warrant is not the end of the qualified immunity inquiry. Qualified immunity still will "be lost, for example, where the warrant was 'based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.'"[48] The Court did not find this to be the situation in this case. Accordingly, the Court found that qualified immunity was appropriate.

With respect to the authorization to seize all firearms, the Court noted that "it would not be unreasonable for an officer to conclude that there was a 'fair probability' that the sawed-off shotgun was not the only firearm Bowen owned," and it "certainly would have been reasonable for an officer to assume that Bowen's sawed-off shotgun was illegal."[49] Therefore, Chief Justice Roberts continued, "a reasonable officer could conclude that there would be additional illegal guns among others that Bowen owned."[50] Chief Justice Roberts also explained that a reasonable officer could believe that seizing all firearms rather than just the sawed-off shotgun could be necessary to prevent Bowen from using a different weapon to do harm to Kelly.

Chief Justice Roberts then turned to the authority to seize gang paraphernalia during the search. Following a brief discussion of the potential uses for evidence of Bowen's membership in a gang, Roberts concludes by simply stating, "[w]hatever the use to which evidence of Bowen's gang

involvement might ultimately have been put, it would not have been 'entirely unreasonable' for an officer to believe that the facts set out in the affidavit established a fair probability that such evidence would aid the prosecution of Bowen for the criminal acts at issue."[51]

Because reasonable officers could have reached these conclusions on the items to be seized, it cannot be said that the officers in this case violated anyone's clearly established statutory or constitutional rights of which a reasonable person would have known. Therefore, the Court did not have to determine whether the facts presented in the affidavits—alone or taken together—actually did establish probable cause. The Court pointed out that this is because the "'officers' judgment that the scope of the warrant was supported by probable cause may have been mistaken, but it was not 'plainly incompetent.'"[52] This is consistent with one of the goals of qualified immunity, which is to "give government officials breathing room to make reasonable but mistaken judgments."[53]

The Supreme Court decided two other qualified immunity cases shortly after ruling in *Messerschmidt*. In *Filarsky v. Delia,* the city of Rialto, California, hired Steve Filarsky, a private attorney, to assist in the internal investigation into one of its firefighters named Nicholas Delia.[54] The city suspected that the firefighter remained on medical leave when he was capable of returning to work. The city initiated surveillance on Delia and observed him purchasing building supplies. Thinking Delia was doing a project at his home, rather than returning to work, the city ordered him to appear for an interview where Filarsky was present. After confronting Delia with their suspicions, fire department officials asked for consent to search Delia's home to see whether the work was ongoing or completed. He refused to provide consent, but was compelled by the department to produce the building

materials onto his lawn so that the city officials could be sure he had not been working at his home during his medical-related absence from work.

Delia brought a civil lawsuit against numerous individuals, including the private attorney, for a violation of his Fourth Amendment rights. Initially, the federal district court granted summary judgment to all of the individual defendants based on qualified immunity because there had not been a violation of a clearly established right.[55] However, the Ninth Circuit Court of Appeals concluded that while the order to produce the materials from his home onto his lawn did violate Delia's Fourth Amendment rights, the court ruled that all defendants except for Filarsky, the private attorney, were entitled to qualified immunity because that right was not clearly established at the time the order was given.[56] Finding no dispute that qualified immunity was appropriate in the case, the Supreme Court agreed only to determine whether the private attorney also was entitled to its protection even though he worked for the government on something other than a permanent or full-time basis.

The Supreme Court found no reason to differentiate between the other defendants in this case and Filarsky. In fact, the Court found several reasons for treating them the same. Among those reasons was that "[a]ffording immunity not only to public employees but also to others acting on behalf of the government similarly serves to 'ensure that talented candidates [are] not deterred by the threat of damages suits from entering public service.'"[57] The Court noted the hypocrisy that would result if some people doing a job for the government could be sued personally, while government employees performing the same tasks would be protected by qualified immunity.

Finally, the Supreme Court also entertained a qualified immunity case involving Secret Service Vice Presidential Protective Detail members in *Reichle v. Howards*.[58] The issue in the case was not whether the Secret Service agents had probable cause to arrest, but whether they were immune from the suit that alleged the arrest was in retaliation for political speech protected by the First Amendment.

The defendants in the civil suit were Secret Service agents assigned to protect Vice President Richard Cheney while he visited a shopping mall in Beaver Creek, Colorado, in 2006. When one of the agents overheard Steven Howards say he was going to ask the vice president an inflammatory question, the agents watched Howards closely. The agents saw Howards approach Cheney, make a comment to him, and touch the vice president before walking away. When questioned by the agents, he denied touching the vice president. Howards was arrested and charged with harassment under Colorado law. That charge was dismissed, but Howards brought a civil lawsuit claiming both First and Fourth Amendment violations. After the U.S. District Court for the District of Utah denied the agents' request for qualified immunity, the Circuit Court of Appeals for the Tenth Circuit concluded that because the agents had probable cause to arrest Howards, they enjoyed qualified immunity from the Fourth Amendment claim. However, the Tenth Circuit denied qualified immunity as to the First Amendment allegation. The Supreme Court reversed, affording qualified immunity from the First Amendment allegation as well.

The Court used its prerogative of first considering the "clearly established" prong

of the two-prong inquiry into whether qualified immunity was available in reaching its conclusion. To be clearly established, the Court reminded, "a right must be sufficiently clear 'that every reasonable official would [have understood] that what he was doing violates that right.'"[59] Because "[t]his Court has never recognized a First Amendment right to be free from a retaliatory arrest that is supported by probable cause[,] nor was such a right otherwise clearly established at the time of Howards' arrest," it stood to reason that the Secret Service agents involved in Howards' arrest were entitled to qualified immunity.[60]

CONCLUSION

Law enforcement is a difficult profession. It presents many challenges and risks, as well as great rewards, to those who undertake it. One of the risks associated with law enforcement is the possibility of being sued civilly for an action taken in the course and scope of one's employment. In an effort to mitigate the costs and burden of defending oneself from a lawsuit, government actors are entitled to assert immunity as a barrier to being sued. For law enforcement officers, the level of immunity available is qualified immunity. As the name implies, this type of immunity is protective, but is not an absolute guarantee against successfully being sued. It is comforting, though, to know that the purpose of qualified immunity is to protect all but "the plainly incompetent or those who knowingly violate the law."[61] As this article has demonstrated, the test to determine whether qualified immunity should be afforded officers has changed over the years, but the objective nature of the doctrine itself has remained unchanged for nearly 30 years. This objective determination often shields competent law enforcement officers from defending a suit itself, much less from being found liable at the conclusion of a suit.✦

Endnotes

[1] 42 U.S.C. §1983 provides this statutory remedy against state and local law enforcement officers, while the Supreme Court created the same cause of action to be taken against federal law enforcement agents in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971). For a full discourse on the cause of action itself and the elements required for the officer or agent to be found liable, see R. Schott, "Double Exposure: Civil Liability and Criminal Prosecution in Federal Court for Police Misconduct," *FBI Law Enforcement Bulletin,* May 2008, 23-32.

[2] Fed. R. Civ. P. 12(b) sets forth the time frame and the required manner in which to assert traditional defenses, such as "lack of subject matter jurisdiction," "improper venue," and "failure to state a claim upon which relief can be granted." The rule also makes clear that "[i]f a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim."

[3] *Supra* note 1; and *Harlow v. Fitzgerald,* 457 U.S. 800 (1982).

[4] *Supra* note 3 at 818.

[5] *Id.* at 806 (emphasis added).

[6] *Id.* at 807 (internal citations omitted).

[7] *Id.* at 815 (citing *Wood v. Strickland,* 420 U.S. 308, 322 (1975) (emphasis in original)).

[8] *Supra* note 4 at 814.

[9] *Supra* note 6.

[10] *Malley v. Briggs,* 475 U.S. 335, 341 (1986).

[11] *Anderson v. Creighton,* 483 U.S. 635, 645 (1987).

[12] 540 U.S. 551 (2004).

[13] *Id.* at 554.

[14] *Id.*

[15] U.S. Const. Amend. IV.

[16] *Id.* (emphasis added).

[17] *Id.* at 558.

[18] *Id.* at 563.

[19] *Id.* at 564 (quoting *Massachusetts v. Sheppard,* 468 U.S. 981, 988, n. 5).

[20] 523 U.S. 833 (1998).

[21] U.S. Const. Amend. XIV, which states, in pertinent part, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

[22] *Supra* note 20 at 855.

[23] 533 U.S. 194 (2001), receded from, *Pearson v. Callahan,* 555 U.S. 223 (2009).

[24] *Id*. at 199.

[25] 194 F.3d 962, 967 (9th Cir. 1999).

[26] *Supra* note 23 at 200.

[27] *Id*. at 201-209.

[28] *See, e.g., Egolf v. Witmer,* 526 F.3d 104 (3rd Cir. 2008); *Robinette v. Jones,* 476 F.3d 585 (8th Cir. 2007); and *Ehrlich v. Town of Glastonbury,* 348 F.3d 48 (2nd Cir. 2003).

[29] 543 U.S. 194 (2004).

[30] *Id*. at 200; and *Id*. at 201, quoting *Saucier v. Katz,* 533 U.S. 194, 206.

[31] The Ninth Circuit did find that taken in the light most favorable to the party asserting injury, the officer's actions violated a constitutional right and that the right had been clearly established. *Haugen v. Brousseau,* 339 F.3d 857 (9th Cir. 2003).

[32] *Supra* note 28 (Breyer, J., concurring).

[33] 555 U.S. 223 (2009).

[34] *Callahan v. Millard Cty,* 494 F.3d 891 (10th Cir. 2007), *cert. granted,* 552 U.S. 1279 (2008).

[35] *Supra* note 33 at 231.

[36] *Id.* at 236.

[37] *Id.* at 245.

[38] __U.S.___, 132 S. Ct. 1235 (2012).

[39] *Supra* note 12.

[40] This recitation of facts is from the Supreme Court opinion, *supra* note 35. Only direct quotes from the opinion will be cited further.

[41] *Supra* note 38 at 1242.

[42] *Id.* at 1243.

[43] *Id.* (quoting *Millender v. County of Los Angeles,* Civ. No. 05-2298 (C.D.Cal., Mar. 15, 2007), App. To Pet. For Cert. 106, 157).

[44] *Id.*

[45] *Millender v. County of Los Angeles,* 564 F.3d 1143, 1145 (9th Cir. 2009).

[46] *Supra* note 38 at 1244 (quoting *Millender v. County of Los Angeles,* 620 F.3d 1016, 1033 (9th Cir. 2010)).

[47] *Id*. at 1245 (quoting *United States v. Leon,* 468 U.S. 897, 922-923 (1984)). The Court goes on in a footnote following this quote to point out that while *Leon* involved the proper application of the exclusionary rule to remedy a Fourth Amendment violation, the same standard of objective reasonableness defines the qualified immunity accorded an officer who obtained or relied on an allegedly invalid warrant.

[48] *Id.*

[49] *Supra* note 38 at 1246 (quoting *Illinois v. Gates,* 462 U.S. 213, 238 (1983)); and *supra* note 38 at 1246.

[50] *Id*.

[51] *Id*. at 1248-1249 (quoting *United States v. Leon,* 468 U.S. at 923).

[52] *Id*. at 1249 (quoting *Malley v. Briggs,* 475 U.S. 335, 341 (1986)).

[53] *Id*. (quoting *Ashcroft v. al-Kidd,* 563 U.S. ___, ___, 131 S. Ct. 2074, 2085 (2011)).

[54] ___ U.S. ___, 132 S. Ct. 1657 (2012).

[55] *Id*. at 1661.

[56] *Id*.

[57] *Id*. at 1665 (citing *Richardson v. McKnight,* 521 U.S. 399, 408 (1997), quoting *Wyatt v. Cole,* 504 U.S. 158, 167 (1992)).

[58] 566 U.S. ___ (2012).

[59] *Id*. at ___, citing *Ashcroft v. al-Kidd,* 563 U.S. ___, ___, (2011), quoting *Anderson v. Creighton,* 483 U.S. 635, 640 (1987).

[60] 566 U.S. at ___ (2012).

[61] *Supra* note 10.

Clarification

The U.S. Department of Justice's Office of Tribal Justice and the FBI's Legal Instruction Unit, Office of General Counsel, provide the following clarification to the article "Indian Country and the Tribal Law and Order Act of 2010" that appeared in the May 2012 issue. The article states that the Metlakatla Tribe is not subject to PL-280. That is not accurate. All Indian country in Alaska is subject to PL-280, including the Metlakatla Tribe's reservation. In Alaska and other areas subject to PL-280, tribes still possess authority to exercise criminal jurisdiction if they so choose. The Tribal Law and Order Act (TLOA) encourages but does not grant cross-deputization for law enforcement officers working in Indian country. The article incorrectly states that the Indian Civil Rights Act of 1968 (ICRA) prohibits the use of the exclusionary rule in tribal courts. In fact, the ICRA does not prohibit the use of the exclusionary rule in tribal courts. Also, the Major Crimes Act includes two additional criminal offenses that did not appear in the article: felony child abuse and neglect. Finally, while the TLOA provides for many important changes in the Indian country criminal justice system, the Act did not appropriate any funding for implementation.

Also, the editorial staff would like to advise readers that the word "They" was left out of the first sentence on page 18 of the article "Picketers, Protesters, and Police: The First Amendment and Investigative Activity" that appeared in the August 2012 issue. The sentence should have read, "They involve war protesters, death penalty protesters, persons participating in labor disputes, and political protesters and take the form of marches, rallies, and boycotts." The sentence in the August issue has been corrected in the online version.

Bulletin Notes

Law enforcement officers are challenged daily in the performance of their duties; they face each challenge freely and unselfishly while answering the call to duty. In certain instances, their actions warrant special attention from their respective departments. The *Bulletin* also wants to recognize those situations that transcend the normal rigors of the law enforcement profession.


Lieutenant Rudolph


Officer Adams


Officer Haimes

Lieutenant Anthony Rudolph and Officers Dana Adams and Shane Haimes of the Memphis, Tennessee, Police Department's Harbor Patrol received a distress call one night concerning six stranded boaters who were low on fuel and travelling in the wrong side of the Mississippi River channel. The boaters, inexperienced and in grave danger, were taking on 8-to-10 foot wakes that were causing their vessel to float uncontrollably in and out of commercial barging traffic. The Harbor Patrol officers made contact with the boaters after a 45-minute effort and advised them of maneuvers that would allow their vessel to stay afloat until they could be reached. Searching through the complete darkness of the river, the officers eventually discovered the six panic-stricken boaters and rescued them and their pontoon boat without incident.


Deputy Sheriff Kirkpatrick

Deputy Sheriff Benjamin Kirkpatrick of the Polk County, Florida, Sheriff's Office was dispatched to assist fire rescue personnel on a medical call regarding a 10-month-old boy who was choking on an unknown object. Arriving first at the scene, Deputy Kirkpatrick discovered that the victim had stopped breathing, and he took immediate action by placing the boy over his knee to deliver back thrusts. After four or five thrusts, he saw a piece of food dislodge from the victim's mouth. The child then began to cry and resumed breathing on his own. Deputy Kirkpatrick continued to hold and comfort him as paramedics arrived and transported the child to the hospital to confirm he was out of danger.

Nominations for the Bulletin Notes should be based on either the rescue of one or more citizens or arrest(s) made at unusual risk to an officer's safety. Submissions should include a short write-up (maximum of 250 words), a separate photograph of each nominee, and a letter from the department's ranking officer endorsing the nomination. Submissions can be mailed to the Editor, *FBI Law Enforcement Bulletin*, FBI Academy, Quantico, VA 22135 or e-mailed to *leb@ic.fbi.gov*. Some published submissions may be chosen for inclusion in the Hero Story segment of the television show "America's Most Wanted."

U.S. Department of Justice
Federal Bureau of Investigation
FBI Law Enforcement Bulletin
935 Pennsylvania Avenue, N.W.
Washington, DC 20535-0001

Periodicals
Postage and Fees Paid
Federal Bureau of Investigation
ISSN 0014-5688

Official Business
Penalty for Private Use $300

Patch Call

The Astoria, Oregon, Police Department was instituted in 1879 and is one of the oldest law enforcement agencies in the western United States. The patch of its police department prominently depicts the Astoria Column, built in 1920 to commemorate the end of the railroad in the West. The column, which overlooks the city, is modeled after Trajan's column in Rome. In the background is a section of the Astoria-Megler Bridge.

In the background of the Bartonville, Illinois, Police Department patch is an outline of the state with a star indicating Bartonville's location. The rocket depicted on the left is the symbol of Limestone Community High School, whose art students designed the patch, while the steel ladle on the right represents the Keystone Steel and Wire Company. The large building at the bottom represents the Peoria State Mental Hospital, opened in 1902 and closed 70 years later.